No. 75-1881

In the Supreme Court of the United States

OCTOBER TERM, 1975

U. S.
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MICHAEL RODAK, JR., CLERK

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

ANNA RHEYNARD, on behalf of her minor daughter, TAMYRA L. RHEYNARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

JURISDICTIONAL STATEMENT

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a-7a) is not yet reported.

JURISDICTION

The order of the district court (App. B, *infra*, pp. 8a-9a), holding unconstitutional Section 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. 416

(h)(3)(C)(ii), was entered on February 3, 1976. A notice of appeal to this Court was filed on March 3, 1976 (App. C, *infra*, pp. 10a-11a). On April 21, 1976, Mr. Justice Stewart extended the time for docketing the appeal to and including July 1, 1976. This Court's jurisdiction is conferred by 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763, n. 8.

QUESTION PRESENTED

Whether Section 216(h)(3)(C)(ii) of the Social Security Act violates the Due Process Clause of the Fifth Amendment insofar as it conditions certain illegitimate children's receipt of surviving child's insurance benefits upon a showing that a deceased male wage-earner was their father and was, at the time of his death, living with them or contributing to their support.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent provisions of the Fifth Amendment and the Social Security Act are set forth in Appendix D, *infra*, pp. 12a-14a.

STATEMENT

1. This is an appeal from a decision of a single-judge district court holding unconstitutional Section 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. 416(h)(3)(C)(ii). The constitutionality of this statute is presently before the Court in *Norton* v. *Mathews*, No. 74-6212, and *Mathews* v. *Lucas*, No. 75-88, both of which were argued on January 13, 1976. We therefore only briefly summarize the statutory scheme here.

Surviving child's insurance benefits are payable to children under the age of 18 who were dependent upon a deceased wage-earner at the time of his death. Section 202(d)(1)(B) and (C) of the Act.[1] The Act establishes a presumption of dependency in the case of legitimate children who have not been adopted by another individual. Section 202(d)(3) of the Act. A similar presumption applies to illegitimate children who satisfy certain statutory criteria.[2]

Children who are not within any of these categories, *i.e.*, legitimate children who have been adopted by another individual and other illegitimate children, are not presumed to have been dependent upon their deceased father. In order to receive surviving child's insurance benefits, such children must show that the deceased wage-earner was their father and that, at the time of his death, he had been living with them or contributing to their support. Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Act.

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[1] We describe the statutory scheme here only as it operates upon the death of a *male* wage-earner, as that is the circumstance of this case.

[2] Dependency is presumed in the case of an illegitimate child (1) whose parents went through a marriage ceremony that was rendered invalid by a non-obvious legal impediment or (2) whose father (a) acknowledged his paternity in writing, (b) had been decreed by a court to be the child's father or (c) had been ordered by a court to support the child because the child was his son or daughter. Sections 202(d)(3) and 216(h)(2)(B) and (h)(3) of the Act.

2. Appellee applied on behalf of her illegitimate daughter for surviving child's insurance benefits on the earnings account of the child's deceased father, Richard C. Neal. Appellee never married Neal and they lived together for only a short period in 1959. Neal left before the daughter was born and thereafter had only occasional contacts with appellee before his death. He never acknowledged his daughter and never contributed to her support (App. A, *infra*, p. 3a). The Secretary accordingly denied the application for child's insurance benefits.

Appellee then commenced this suit in the district court pursuant to Section 205(g) of the Act, claiming that Section 216(h)(3)(C)(ii) of the Act violates the Fifth Amendment insofar as it requires illegitimate children to demonstrate dependency without requiring a similar showing in the case of legitimate children. Relying on *Tanner* v. *Weinberger*, 525 F. 2d 51 (C.A. 6), the district court held that Section 216(h)(3)(C)(ii) was unconstitutional (App. A, *infra*, p. 7a) and ordered the payment of benefits to appellee's daughter (App. B, *infra*, p. 9a).

THE QUESTION IS SUBSTANTIAL

The constitutionality of Section 216(h)(3)(C)(ii) is before the Court in *Norton* v. *Mathews*, *supra*, and *Mathews* v. *Lucas*, *supra*. For the reasons stated at pp. 27-43 in our brief in *Norton*,[3] we believe that the provision is constitutional.

[3] We are sending appellee a copy of our briefs in *Norton* and in *Lucas*.

Since this Court's ruling in *Lucas* will be dispositive of the instant appeal,[4] we suggest that the Court hold this case in abeyance pending disposition of that case.

CONCLUSION

The appeal should be held pending this Court's disposition of *Mathews* v. *Lucas*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

[4] We contend that this Court lacks jurisdiction of the *Norton* appeal; if the Court accepts our contention it will not reach the merits of the due process issue in *Norton*. The jurisdictional question is not, however, present in *Lucas*.

APPENDIX A

UNITED STATES OF AMERICA
IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

K74-232 C.A.

[Filed Feb. 3, 1976, Gerald H. Liefer, Clerk,
By /s/ L. K., Deputy]

ANNA RHEYNARD, on behalf of her minor daughter,
TAMYRA L. RHEYNARD, PLAINTIFF

v.

CASPAR WEINBERGER,* Secretary, Department of Health, Education and Welfare, individually and in his official capacity, DEFENDANT

OPINION

This is an action under section 250(g) [*sic*] of the Social Security Act, 42 USC § 405(g), to review a final decision of the Secretary of the Department of Health, Education and Welfare that the plaintiff is not entitled to child's insurance benefits under section 202(d) of the Act, 42 USC § 402(d). Plaintiff,

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* Caspar Weinberger has been replaced by David Mathews as Secretary of Health, Education and Welfare.

on behalf of her minor daughter, seeks a declaration that 42 USC § 416(h)(3)(C)(ii) is unconstitutional insofar as it discriminates against plaintiff in violation of the Fifth Amendment to the Constitution of the United States. In addition, plaintiff prays for an order enjoining the Secretary from refusing to grant plaintiff child's insurance benefits merely because the daughter is illegitimate and unable to establish that her father lived with her or contributed to her support at the time of his death.

On September 13, 1972, Anna Rheynard filed an application on behalf of her minor daughter, Tamyra L. Rheynard, for surviving child's insurance benefits under the account of the deceased wage earner, Richard C. Neal, Tamyra's father. After administrative denial of the claim, a hearing was held before an administrative law judge who likewise issued a decision denying the claim. That became a final decision of the Secretary when it was affirmed by the Appeals Council on May 23, 1974. The present action followed. Plaintiff has not sought to bring the case as a class action.

Because there was an application for an injunction restraining the enforcement, operation, or execution of an Act of Congress for repugnance to the Constitution of the United States, a three-judge court was requested and convened. 28 USC §§ 2282, 2284. The three-judge court has dissolved itself based on Justice Rehnquist's statement for the United States Supreme Court in Weinberger v. Salfi, 442 U.S. 749, 763 n.8 (1975). See Fleming v. Nestor, 363 U.S.

603, 607 (1960); cf. Lee v. Thornton, 420 U.S. 139 (1975). The case is now before me pursuant to cross motions for summary judgment.

The facts are not in dispute. Tamyra was born in Battle Creek, Michigan, on February 27, 1960. She is the natural child of Anna M. Rheynard and the deceased wage earner, Richard C. Neal. Anna never married Neal and they lived together for only a short period in 1959. Neal left before Tamyra was born and thereafter had only occasional contacts with Anna before his death. He never acknowledged Tamyra was his daughter and never contributed to her support.

The Sixth Circuit has recently decided a case which is substantially identical with the instant one. Tanner v. Weinberger, 525 F.2d 51 (1975). The Court of Appeals reviewed the Social Security provisions which also apply to our case:

> Under the applicable provisions of the Social Security Act, the child of a deceased wage earner, who was dependent on the wage earner at the time of the latter's death is entitled to child's insurance benefits. 42 U.S.C. § 402(d)(1)(C)(ii). A legitimate child is "deemed" dependent and automatically qualifies for benefits. 42 U.S.C. §§ 416(e)(1) and 402(d)(3)(A). An illegitimate child also may qualify for benefits under one of several alternative provisions of the Act. An illegitimate child who could inherit personalty from the wage earner under the intestacy laws of the wage earner's state of domicile is eligible for benefits. 42 U.S.C. §§ 416(h)

(2)(A), 416(e)(1) and 402(d)(3). A child whose illegitimacy results solely from formal, non-obvious defects in his parents' ceremonial marriage is entitled to receive benefits. 42 U.S.C. §§ 416(h)(2)(B), 416(e)(1) and 402 (d)(3). And an illegitimate child may qualify for benefits if it is shown that the wage earner prior to his death either: (1) had acknowledged in writing paternity of the illegitimate child; (2) had been decreed by a court to be the father of the child; or (3) had been ordered by a court to contribute to the support of the illegitimate child. 42 U.S.C. §§ 416(h)(3)(C)(i), 416(e) (1) and 402(d)(3). Illegitimate children unable to provide a written acknowledgement, a paternity decree, or a support order may still qualify for benefits under 42 U.S.C. § 416(h) (3)(C)(ii), the provision challenged herein, if the wage earner is shown by evidence satisfactory to the Secretary to be the father and the wage earner was living with or contributing to the support of the illegitimate child at the time of his death.[1]

The Sixth Circuit held that the reasoning of the Supreme Court in Jimenez v. Weinberger, 417 U.S. 628 (1974), dictates the conclusion that the provision challenged herein is unconstitutional:[2]

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[1] Tanner, supra, 525 F.2d at 53. In Tanner, the father had at one time made voluntary contributions to the illegitimate son's support, but had ceased that practice before his death. As a result, the son was, as is Tamyra in our case, statutorily ineligible for benefits under the Act.

[2] The Sixth Circuit expressly disagreed with the result reached by a three-judge district court for the District of Maryland. Norton v. Weinberger, 364 F.Supp. 1117 (D.Md. 1973), vacated 418 U.S. 902 (1974), adhered to, 390 F.Supp. 1084 (D.Md. 1975), appeal pending in Supreme Court, 422 U.S. 1054 (No. 74-6212, June 30, 1975).

In accord with the Sixth Circuit's view is Lucas v. Secretary of H.E.W., 390 F.Supp. 1310 (D.R.I. 1975), probable jurisdiction noted, 46 L.Ed.2d 36 (No. 75-88, 10/6/75) (set for argument in tandem with Norton before the Supreme Court).

Underlying the Supreme Court's decision in *Jimenez* is its characterization of the purpose of the statutory scheme at issue. While the government sought to justify the challenged classification as rational because it furthered the Act's purpose of replacing only actual support lost by dependent children as a result of the onset of disability, the Court expressly rejected this view, stating instead that "the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner." *Jimenez, supra* 417 U.S. at 634, 94 S.Ct. at 2500. Actual support or the lack of it prior to the event insured against (disability) was not considered determinative of the requisite economic dependency, and therefore, was not a rational basis for excluding the Jimenez children from eligibility.

The Court also found the statutory classification to be both "overinclusive" and "underinclusive" in that it provided benefits for some children who are not dependent (legitimate children and some illegitimate children "deemed" dependent), and denied benefits to some illegitimate children, such as the Jimenez children, who are

in fact dependent. *Jimenez, supra* at 637, 94 S.Ct. 2496.[3]

The unanimous opinion in Tanner concluded:

> The Supreme Court dealt with a closely analogous statutory scheme in *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). That provision automatically allowed benefits for the wives of servicemen, but required women in the service to prove actual dependency of their husbands in order to qualify for such benefits. This additional burden resulted in one subclass of married servicewomen receiving benefits while a second subclass (those whose husbands could not prove factual dependency) could not. The Supreme Court held the statute discriminated on the basis of sex and not merely between two subclasses of women. Likewise, we conclude that the statute in the instant case discriminates between legitimate and illegitimate children solely on the basis of the circumstances of their births.
>
> In essence the discriminatory impact of this statute is twofold: first, procedurally, an illegitimate child is required to demonstrate dependency, while no such burden is imposed upon legitimate children; and second, substantively, a legitimate child who was not dependent on the deceased insured receives survivor's benefits, while a similarly situated illegitimate child, who cannot meet any of the requirements by which he is "deemed" dependent is denied benefits. *See, Frontiero* v. *Richardson, supra* at 680, 93

[3] Tanner, supra, 525 F.2d at 55.

> S.Ct. 1764. Society's view, reflected in this statutory scheme, that legitimate and legitimated children are more readily entitled to support by or through a parent than are illegitimate children is not a valid governmental interest sufficient to support the challenged classification. *Lucas* v. *Secretary of H.E.W.*, *supra* at 1320. "Although Congress has great latitude to make classifications in the area of economic and welfare legislation, a provision must have some rational basis or be pertinent to some proper objective of the Congress in order to withstand challenge." *Davis* v. *Richardson*, D.C.Conn., 342 F.Supp. 588, 591, *aff'd*, 409 U.S. 1069, 93 S.Ct. 678, 34 L.Ed.2d 659 (1972).
>
> We conclude that the major thrust of *Jimenez* v. *Weinberger* and preceding Supreme Court cases is that once paternity is proved by either the formal procedures of the Act or otherwise "to the satisfaction of the Secretary" all children otherwise qualifying under the Act must be accorded the same presumption of dependency.[4]

Tanner is controlling authority on the issue before this court. Section 416(h)(3)(C)(ii) is unconstitutional and the Secretary's denial of Tamyra's claim must be reversed. Plaintiff's counsel may request attorney's fees in compliance with 42 USC § 406(b).

Dated: February 3, 1976.

/s/ Noel P. Fox
Chief District Judge

[4] Id. at 56-57.

APPENDIX B

UNITED STATES OF AMERICA
IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

K74-232 C.A.

[Filed Feb. 3, 1976, Gerald H. Liefer, Clerk,
By /s/ L. K., Deputy]

ANNA RHEYNARD, on behalf of her minor daughter.
TAMYRA L. RHEYNARD, PLAINTIFF

v.

CASPAR WEINBERGER,* Secretary, Department of Health, Education and Welfare, individually and in his official capacity, DEFENDANT

ORDER

Having held that 42 USC § 416(h)(3)(C)(ii) is unconstitutional, IT IS HEREBY ORDERED:

(1) Plaintiff's motion for summary judgment is granted;

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* Caspar Weinberger has been replaced by David Mathews as Secretary of Health, Education and Welfare.

(2) Defendant's motion for summary judgment is denied; and
(3) The Secretary's denial of Tamyra Rheynard's claim is hereby reversed and the within case is remanded to the Secretary with the direction to process and grant that claim in light of this opinion.

Dated: February 3, 1976.

/s/ Noel P. Fox
Chief District Judge

APPENDIX C

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. K 74-232 CA

ANNA RHEYNARD, on behalf of her minor daughter, TAMYRA L. RHEYNARD, PLAINTIFF

v.

DAVID MATHEWS,[1] Secretary, Department of Health, Education and Welfare, individually and in his official capacity, DEFENDANT

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252 and 2101 from the judgment of the District Court entered in this action on February 3, 1976.

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[1] David Mathews succeeded Caspar Weinberger as Secretary of Health, Education and Welfare on August 11, 1975. David Mathews should be substituted, therefore, for Caspar Weinberger as the defendant in this suit. No further action need be taken to continue the suit by reason of the last sentence of Section 205(g) of the Act, 42 U.S.C.A. § 405(g).

Dated at Grand Rapids, Michigan, this 3rd day of March, 1976.

DAVID MATHEWS
Secretary of Health, Education,
and Welfare, Defendant
FRANK S. SPIES
United States Attorney

By /s/ J. Terrance Dillon
J. TERRANCE DILLON
Assistant United States Attorney
Attorneys for Defendant
Business Address:
544 Federal Building
Grand Rapids, Michigan 49502

APPENDIX D

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 202(d)(1) and (3) of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. 402(d)(1) and (3), provide in pertinent part:

> (d)(1) Every child (as defined in section 416 (e) of this title) of an individual entitled to old-age or disability insurance benefits or of an individual who dies a fully or currently insured individual, if such child—
>
> (A) has filed application for child's insurance benefits,
>
> (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 18, and
>
> (C) was dependent upon such individual—
>
> (i) if such individual is living, at the time such application was filed,
>
> (ii) if such individual has died, at the time of such death, or
>
> (iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the

> beginning of such period of disability or at the time he became entitled to such benefits,
>
> * * * * *
>
> (d)(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—
>
> (A) such child is neither the legitimate nor adopted child of such individual, or
>
> (B) such child has been adopted by some other individual.
>
> For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

Section 216(h)(3) of the Social Security Act, as added, 64 Stat. 492, and amended, 42 U.S.C. 416(h)(3), provides in pertinent part:

> (3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:
>
> * * * * *
>
> (C) in the case of a deceased individual—
>
> (i) such insured individual—

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

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